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No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,
Appellants,

v.

CHRIS SCHMID,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF APPELLANT PRINCETON UNIVERSITY OPPOSING MOTION TO DISMISS OR AFFIRM

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ARGUMENT

I. ***Appellee's argument for dismissal misstates the decision below.***

Appellee seeks to fit the decision below into the rationale of *Prune Yard Shopping Center v. Robins*, —U.S.—, 100 S. Ct.

2035 (1980). To do so he wrongly characterizes the rationale of the New Jersey Supreme Court, claiming that it "correctly determin[ed] that the right of free flow of political information asserted by Appellee was so fundamental that, regardless of its possible lack of protection by the First Amendment of the United States Constitution, it was protected by the New Jersey Constitution . . . " (Motion to Dismiss or Affirm, p. 4). Nowhere did the court below say or imply anything of the kind. Nowhere did it suggest, as did the California Supreme Court in *Robins v. Prune Yard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 347 n.5, 153 Cal. Rptr. 854 (1979), that the free flow of information important to its political processes had been curtailed by the private ownership of hitherto public forums. Nowhere did it confine its decision to the "free flow of *political* information" (emphasis added).

Nor can one find *Prune Yard*-like facts in this record. Indeed, the New Jersey Supreme Court explicitly concluded that "numerous public areas [contiguous to the campus] apparently furnish to members of the public, as well as the college community, ample alternative locations other than the property of the University itself as means for the dissemination and exchange of information, views, and ideas" (Jurisdictional Statement, p. 14a).

II. *Appellee's view that the academic freedom protected by the First Amendment applies equally to public and private universities is erroneous.*

The greatness of the First Amendment lies in its reach. It protects from governmental interference that academic freedom defined in terms of " 'speculation, experiment and creation' ", of which appellee approves and, equally, "the right of 'indoctrination in virtually any set of beliefs' ", which he deplores (Motion to Dismiss or Affirm, p. 5). Far from being "Orwellian newspeak", the latter equally with the former is the essence of the freedom protected. Ironically, the more appellee paints Princeton's claim to that protection as "shocking," "truly dangerous," "frivolous," and "unworthy" (Motion to Dismiss

or Affirm, pp. 5, 6), the more he demonstrates both the need and the wisdom of according Princeton such protection from government.[1] Without that protection, Princeton's "academic freedom" becomes a mockery which can be violated at will.

It would seem obvious that the scope of a private university's choice of what it will or will not teach is broader than that of a public university. Since a public educational institution is funded by public monies it cannot, of course, engage in the indoctrination of students in particular religious, political or ideological viewpoints.[2] At the same time—and for essentially the same reasons—the courts have recognized the importance to public education of protecting through the First Amendment the independence of public institutions, and especially those who teach there, from political pressures.[3]

Cases involving academic freedom tend to come up in the context of public institutions, that being where governmental interference is most likely to occur. And one can certainly define "academic freedom" in ways which make it especially applicable to public institutions. But this should not lead one to conclude, as appellee appears to do, that the First Amendment applies to private and public universities in a like manner. Private institutions enjoy freedoms which governmental ones do not, simply because the latter are governmental. A public university is *required* to adopt an ideologically neutral educational philosophy and curriculum. Private universities are not. It is ironic and anomalous to urge this Court to conclude that

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[1] It is also ironic that an organization which has so significantly and importantly defended unpopular causes as has the American Civil Liberties Union should fail to appreciate the importance of permitting the broadest scope to the freedom of private universities. Its failure to do so demonstrates the reality of the danger warned of in Point III of Princeton's Jurisdictional Statement.

[2] *See, e.g., Chamberlin v. Dade County Board of Public Instruction*, 377 U.S. 402 (1964); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

[3] *See, e.g., Regents of University of California v. Bakke*, 438 U.S. 265, 312-13 (1978) (opinion of Stevens, J.); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 580-82 (1972) (Douglas, J., dissenting); *Whitehill v. Elkins*, 389 U.S. 54, 59-60 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion), 261-62 (Frankfurter, J., concurring in result).

the protected exercise of First Amendment rights can render a private educational institution subject to those requirements, which were designed—for the same First Amendment reasons —to constrain public ones.

These principles are fundamental to a free society. We encourage thought, speech and worship free from governmental regulation and we insure the widest freedom to individuals, groups and organizations to espouse particular viewpoints and to attempt to convince others. From the variety of such groups, each urging its own viewpoint, society as a whole is enriched.

But it seems to us that appellee (and the court below) confuses the general desirability of encouraging the presence in society of a diversity of viewpoints with something quite different: the proposition that each group (each private college or university, in this case) should be compelled to hear views which differ from those it espouses. This would impose a particular additional philosophy on all private colleges and universities. That that philosophy in its broad commitment to "openness" and the free examination of ideas happens to be one that Princeton University embraces wholeheartedly as its own should not obscure the much larger implications of such an approach for our concept of freedom. One can imagine a concept of freedom predicated on a more or less uniform, governmentally mandated and governmentally enforced kind of "openness" required of every private group. But surely that is not what the Framers of the Constitution had in mind. Their concept of freedom was both more robust and less homogenized. It allows private groups, as well as individuals, to promote their own ideas in their own ways, constrained finally by the limits of their persuasiveness, not by governmental judgments as to what is "suitable" or "reasonable" (Jurisdictional Statement, p. 27a).

III. *Princeton University has standing to appeal the decision below.*

Appellee's contention that this Court should refuse jurisdiction of this appeal because Princeton lacks standing has no basis in law or policy. The requisites for standing are: that

the person seeking review have been a party below;[4] that the party have a personal interest in the litigation;[5] and that the party be aggrieved by the decision sought to be reviewed.[6] Princeton meets those criteria.

Princeton was a party to the proceedings below, having accepted the invitation of the New Jersey Supreme Court to intervene in defendant's appeal.[7] Princeton was not formally a party at the trial stages, but counsel for Princeton prosecuted the case on behalf of the State in the municipal court.[8] Thus, Princeton has participated from the start, and its interest has been recognized by the New Jersey courts and by the Attorney General.

Princeton is not "asking this Court to order New Jersey to invoke its criminal process" (Motion to Dismiss or Affirm, p. 3). Princeton is simply asking this Court to hold that the state constitutional provisions pursuant to which appellee's conviction was overturned are, as interpreted, repugnant to the United States Constitution. Should this Court so determine, further proceedings would be the responsibility of New Jersey authorities.

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[4] *E.g., In re Leaf Tobacco Board of Trade*, 222 U.S. 578 (1911); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978); *cf. Adams v. Morton*, 581 F.2d 1314 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979) (person whose objections were entertained will not be heard to say he was not a party).

[5] *E.g., Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77, 83 (1958); *Williams v. Morgan*, 111 U.S. 684 (1884); *In re Michigan-Ohio Building Corp.*, 117 F.2d 191 (7th Cir. 1941); *King v. Buttolph*, 30 F.2d 769 (9th Cir. 1929).

[6] *E.g., Swann v. Adams*, 385 U.S. 440, 443 (1967); *Lewis v. United States*, 216 U.S. 611 (1910); *United States v. Shelley*, 218 F.2d 157 (2d Cir. 1954).

[7] While there is no published rule in New Jersey with respect to intervention in a criminal case, the New Jersey Supreme Court is empowered to make rules governing practice and procedure in the State, N.J. Const., art. VI, sec. 2, para. 3, and may exercise its power by case law rather than rule-making process, *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571, 577 (dictum), *appeal dismissed*, 414 U.S. 1106 (1973). This Court must accept the New Jersey Supreme Court's determination that State law authorized such participation, *see Boston v. Jackson*, 260 U.S. 309, 313 (1922), and it is clear from the New Jersey court's action on the Petition for Rehearing that, in its view, Princeton was a party with standing.

[8] *See* Rule 7:4-4(b) of the Rules Governing the Courts of the State of New Jersey.

Nor is Princeton here seeking to vindicate a general public interest in the enforcement of the New Jersey criminal laws, or the special interest of a victim in the punishment of an offender, *see Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 378-79 (2d Cir. 1973). It should be obvious that Princeton's interest is unrelated to the criminal dimension of the case. The court below held that appellee had not violated the criminal trespass statute *because* Princeton was obligated by the State Constitution to let appellee use Princeton's campus for his expressive purposes. Thus, Princeton's interest is not whether the state (through refusing, for example, to prosecute) can permit Schmid to impose himself on Princeton; it is, rather, whether the state *itself* can impose Schmid (and all others seeking to engage in expressive activity) on Princeton. It is that state policy which diminishes Princeton's freedom to carry out its educational mission on its own property as it chooses. And it is that policy which renders Princeton a party aggrieved.

Appellee's argument assumes that Princeton is trying to coerce the State to do something which the State is opposed to doing. That assumption is wrong. In fact, the State has joined Princeton in this appeal.

CONCLUSION

For each of the reasons set forth above, this Court should deny appellee's motion to dismiss the appeal or affirm the decision of the court below, and should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

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